IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

Number .....

STELLA T. RAMBO et al.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

BRIEF

In Support of Petition for Certiorari.

Jurisdiction in this Court and the particular errors relied on are stated in the preceding petition for the writ. This brief presents argument and cites authorities in support of that petition.

I. THE PLEADINGS AND STIPULATED FACTS.

(a) **Motion to Dismiss:** Petitioners in their complaint and amendments thereto in the District Court specifically set out the interest each petitioner owned, that they were tenants in common with the United States and others, that the land was not susceptible to partition in kind, and prayed that the equitable procedure of partition by sale be had (R. 10-18). These issues were not considered either in the District Court or the Circuit Court of Appeals (District Court opinion, R. 46 to 56; Circuit Court opinion, R. 170).

The United States made a motion to dismiss, claiming failure to state "a claim against the defendant" (R. 19). A supplemental motion to dismiss was filed, claiming that the Court was "without jurisdiction of this complaint in that the title and possession of the described land, and full and complete ownership thereof, was acquired by this defendant by virtue of condemnation proceedings prior to the filing of such complaint, said possession and said title and complete ownership dating from May the 19th, 1939, when this defendant deposited the amount of the award, representing the adjudicated value of said land in said condemnation proceedings into the registry of the Court * * *" (R. 21).

(b) **Facts**: The facts were agreed on and directly, or by reference, stated in stipulations (R. 25-34). Attached to these stipulations are the orders relating to the service in the condemnation suit at law brought by the United States and the judgment under which it claims title and possession of all the land sought to be partitioned (R. 35-46).

The abstract of the testimony is found in Record, pages 56-76. Defendants, respondents here, in the record on appeal to the Circuit Court of Appeals, added to this record, without any necessity, thus largely increasing the cost of appeal to petitioners, contrary, we submit, to an appropriate procedure on appeal. This useless amplification of the record is found at pages 77 to 152.

(c) **Petitioners' Title**: The record shows petitioners' chain of title from a common source. This record presents no issue of fact, and both the lower courts refused to pass on the legal effect of the undisputed facts.

We do not deem it necessary, certainly not as the issue has not been considered in the Courts below, to discuss petitioners' title. Sufficient now is to show that from the common source of title, petitioners, by a strict foreclosure and the statute of uses, became the owners of their respective portions. (Cf. **Flagg v. Walker, 113 U. S. 659; Code of**

Georgia, 108-112, 108-114; Caldwell v. Hill, 179 Ga. 417, 424, 425.)

It was claimed in the answer to the complaint, but not considered by either of the Courts below, that by the condemnation proceeding, the title of petitioners was vested in the United States. This claim was based on the contention that petitioners were served by serving one of a class of some thirty-five owners. One member of a class so large is not a legal representation. The "practice, pleadings, forms and modes of proceedings," in condemnation suits by the United States, must "conform as near as may be" to that in Georgia **(40 U. S. Code, 257, 258)**. The only class representative sued owned less than 4 per cent, and he made no appearance. This is no fair representation. The Supreme Court of Georgia held that two representatives was the minimum. **Macon R. R. v. Gibson, 85 Ga. 1, 23, 24.** In the English practice, as said by Story **(Equity Pleadings, Section 123, page 136)**, "so many must be joined, as will fairly and honestly try the legal right." Lord Eldon is cited by Story **(Note 3, same page)**, as saying: "The Court, therefore, has required so many, that it can be justly said, they will fairly and honestly try the legal right between themselves, all other persons interested, and the plaintiff."

Having sought to serve petitioners by a class bill, all other forms of service are excluded, but there was an omnibus service. Petitioners were not named in any form of service (R. 50), although the trial Court, when referring to the owners of the land, said:

> "* * * many of them were residents of Cobb and Fulton Counties where the proceedings were advertised and widely known" (R. 52).

Even had this service by publication been directed to petitioners, it was not had according to the statutes of Georgia. The publication was for one week, which, under Georgia law, applies to appointments of assessors, and no assessors were here appointed. The United States filed a plenary

suit at law, which required preliminary negotiations, none of which were had with petitioners, and where service is had by publication, the notice must be published "twice a month for two months" **(Georgia Code, 81-205, 206).** The Supreme Court of Georgia, in **Stiles v. Stiles, 183 Ga. 199, at page 204,** speaking of **Sections 81-206 and 81-207,** said they are

> "jurisdictional and they must be strictly and literally complied with. * * * failure to comply with such requirements before judgment renders the judgment void."

The trial Court, speaking of petitioners, found "many of them were residents of Cobb and Fulton Counties where the proceedings were advertised and widely known" (R. 51, 52).

Unless this Court, which it could without conflicting with the decision in **Slocum v. New York, etc., Insurance Company, 228 U. S. 364,** should, on the undisputed facts, direct a decree of partition and sale, the only issue is one of jurisdiction, and therefore we do not argue the other issues here. The facts are alleged, and on the motion to dismiss are presumed to be true.

II. SUMMARY OF ARGUMENT.

The question of law here presented is:

> **Where a Suit in Equity for Partition Alleges, as Was Adjudicated, the Necessary Jurisdictional Facts, Should Jurisdiction Be Abandoned on the Coming of a Plea of Title?**

The answer for which we contend is "No," because:

The statute literally gives the Court jurisdiction. Appropriate "facts stated in that bill" show, as was adjudicated by the District Court, that jurisdiction existed.

Jurisdiction so shown is not lost by a claim of title.

The proceeding being in equity, a court of equity may determine questions of law, certainly in this case where such issue, if it exists, arises as the decree under which the claim of title is based.

A wrong rule of construction was adopted in the Courts below.

III. THE STATUTE, CONSTRUED LITERALLY, GIVES JURISDICTION.

This is a suit in equity brought by a tenant in common for the partition of lands in a case where the United States are of such tenants. **[Title 28, U. S. Code, Section 41 (25).]**

IV. "FACTS STATED IN THE BILL" DETERMINE JURISDICTION.

> "The question whether remedy must be by action at law or may be pursued in equity notwithstanding objection by defendant depends upon the facts stated in the bill."
>
> **(Schoenthal v. Irving Trust Company, 287 U. S. 92, 95.)**

> "The settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter."
>
> **(American Life Ins. Co. v. Stewart, 300 U. S. 203, 215.)**

Whether or not there is an adequate remedy at law, you "assume the allegations" in the bill are true. **(Petroleum Exploration, Inc., v. Public Service Commission, 304 U. S. 209, 216, 217.)**

We need not extend, as we could, references to similar statements in the decisions of this and other courts.

V. JURISDICTION OF A SUIT IN EQUITY FOR PARTITION IS NOT LOST BY A DEFENDANT'S CLAIM OF TITLE.

Parties to this suit, being tenants in common of the land here sought to be partitioned, and the United States having specifically consented to being sued in equity in partition suits, this Court has jurisdiction.

The United States contended, and the lower court agreed, that their claim of a token possession and title, arising from the answer, deprived the Court of jurisdiction. This claim, if it had presented an issue of fact, would have permitted the Court to send to the law side of the court such issue. **(Clark v. Roller, 199 U. S. 541.)**

In Georgia, as in the United States, "the powers of the courts of law and equity are exercised by the same persons."

In **Griffin v. Griffin, 33 Ga. 107, same title, 153 Ga. 547,** there was a definite plea "that applicant was not a cotenant." Upon that plea the Supreme Court of Georgia said:

> "Upon an application to the Superior Court for partition of land by joint tenant, or tenant in common, under the Act of March 26, 1867, it is proper for that Court, in case of a contest, to go into a consideration of the title, both legal and equitable, and award or refuse the writ, according to the proof made."

Under the old Chancery Rule, where equitable and legal rights were determined in different courts, the rule was the same when the issue was, as here, on the construction of a writing:

> "A chancellor in a suit in equity can determine a question of law based on the construction of writings as well as a judge sitting in a court of law trying an action of ejectment. Brandon v. McKinney, 233 Pa.

481, 82 A. 764 (2). It would cause unnecessary delay and expense to apply the rule requiring title to be first tried at law" **(Galbraith v. Bowen, 5 Pa. Dist. 352).**

Under the Chancery Rule in England, the refusal to permit partition when title was involved was not one of jurisdiction, but a mere procedural rule. The English rule was stated:

> "The reason for remitting the investigation to a common-law court is one of policy and fitness, rather than of inherent want of power in a court of equity * * *" **(Burt v. Hellyar, L. R. A., 15 Eq. 160).**

In Virginia, the Court said:

> " 'To hold otherwise would nullify the statute, (1) and compel a resort to law to try title in every case in which the **defendant set up title in himself,** a result the statute was designed to prevent.' Claughton v. Claughton, 70 Miss. 384, 387, 12 S. 340 (2). 'If the jurisdiction of the Circuit Court could be defeated in this manner, the statute would be of little value, and would fail to attain the chief object for which it was passed.' "

See, also, **Weston v. Stoddard, 137 N. Y. 119, 20 L. R. A. 624, 629, 630 (1893); United States v. Steamer Siren, 74 U. S., 7 Wall. 152, at page 154.**

In substance, this is for jurisdictional purposes supplemental to the suit of the United States, the judgment in which being for construction. This follows from the discussion in Story's Equity Pleading, where, in discussing Bills Impeaching Decrees, he said:

> "There is no doubt of the jurisdiction of Courts of Equity to grant relief against a former decree, where the same has been obtained by fraud and imposition, * * *. A decree obtained without making those per-

sons parties to the suit, in which it is had, whose rights are affected thereby, is fraudulent and void as to those parties."

Such possession as the United States have is based on the condemnation decree, and derives from the same common source as the claim of plaintiffs. The Supreme Court of Georgia, in deciding a similar issue, said:

> "She (the defendant) is therefore lawfully in possession as a tenant in common with the plaintiffs. This being true, she is not subject to be sued in ejectment, or in any other action brought to recover possession at the instance of her co-tenants, simply because she has received more than her share of the income or profits of the land. * * * The remedy given to them, if she is in possession of more than her share of the premises, or if she has received more than her share of the income and profits, is an application for an accounting, or for partition." (Parentheses ours.) **Daniel v. Daniel, 102 Ga. 181, 184.**

VI. THIS IS A PROCEEDING IN EQUITY, AND THE COURT HAS JURISDICTION TO DECIDE ALL ISSUES AND TO GRANT FULL RELIEF.

The lower court's conclusion of law on this point is: "The present proceeding is not a proceeding in equity for partition" (R. 56).

The description of an equitable partition by this Court is here conclusive. You quoted Lorde Redesdale in his work on Pleadings in Chancery, as follows:

> " 'In the case of the partition of an estate, if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at the common law have led to applications to courts of equity for partition, which are effected by first ascertaining the right of the several persons interested, and then issuing a commission to make the partition re-

quired, and upon the return of the commission and confirmation of that return by the court, the partition is finally completed by mutual conveyances of the allotment made to the several parties.'" **Gay v. Parport, 106 U. S., 16 Otto 679, 690, 691.**

Later Chancery Courts adopted the plan of having a commissioner sell the whole tract. See also, **Georgia Code Sections 85-1301 to 85-1515**, cited by Supreme Court of Georgia in **Nixon v. Nixon, 197 Ga. 426.**

The courts below, in this case, we submit, by an unauthorized construction, failed to apply the rules above.

VII. THE COURTS BELOW ERRED IN THE RULE OF STATUTORY CONSTRUCTION.

The rule of construction which should have been adopted was stated by this Court as follows:

> "We are therefore bound to give heed to the rule that, where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute." **(Knowlton v. Moore, 178 U. S. 41, 77.)**

The Courts below should have adopted the rule applied in **United States v. Lee, 106 U. S. 196.** Brief quotations from that opinion are pertinent. At page 210:

> "* * * it certainly can never be alleged that a mere suggestion of title in a State, to property in possession of an individual, must arrest the proceedings of the court and prevent their looking into the suggestion and examining the validity of the title."

There, while in form the United States were not sued, in substance they were, and in denying the claim that no jurisdiction existed, the Court, page 220, said:

> "If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights."

(Cf. the excellent discussion of this case by **Warren**, in his **History of the Supreme Court, Vol. 3, pages 393 to 397**, and note his citation of the case of the stubborn miller against Frederick the Great, at page 397, and his description of the decision in the Lee case, pages 395, 396, "as one of the glories of American Law.")

Here a suit for partition in equity was filed, and the statute clearly authorizes such suit, and the trial judge, on a motion to dismiss, so held (R. 47). The Court below found no ambiguity, but by construction, because by answer the sovereign claimed title, made an exception to the statute. And this in a suit clearly alleging jurisdiction. Such an addition to the statute is not sound and works an injustice.

What is called in **Wallace v. United States, 142 Fed. (2) 240, 243**, a "niggardly rule," is contrary to the public conscience, has been modified in suits on contract, express or implied, and the American Bar is now seeking further modification to include tort suits. The rule itself is but a vermiform appendix, a vestige of the archaic and abandoned concept of a king as ruling by divine right, a vice-god who can do no wrong. Such a rule is in conflict with democracy and grew up from decisions of judges. However, here the United States have literally given consent to be sued in this case, and all we ask is that the consent be not set aside, as it was in the Courts below, by an unauthorized construction.

Wherefore, petitioners pray that their prayer for the writ of certiorari be granted and the judgment of the Circuit Court of Appeals be reversed.

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